82-603

No.

Office - Supreme Ct., U.S.
FILED
SEPT 30
OCT 4 1982
ALEXANDER STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT EARL SAWYER,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

JOHN WARD
District Attorney
Chautauqua County, New York
County Office Building
Mayville, New York 14757
(716) 753-4241
Attorney for Petitioner

MICHAEL A. GROSS
STEVEN J. GREENBLATT
Of Counsel
NYS Division of Criminal Justice Services
Bureau of Prosecution and Defense Services
80 Centre Street
New York, New York 10013
(212) 587-4440

Questions Presented

1. Did the State of New York Court of Appeals err as a matter of law when it concluded that respondent's voluntary election to represent himself was not knowing and intelligent?

2. Are the standards set forth in *Faretta* v. *California*, 422 U.S. 806 (1975), sufficiently clear so that courts may intelligently and consistently apply them when defendants clearly and voluntarily choose to represent themselves?

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Opinions and Orders Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	9
Point One—The New York Court of Appeals improperly decided that defendant-respondent did not intelligently exercise his right to proceed *pro se* because the constitutional standard remains insufficiently defined	9
A. The *Faretta* Standard Is Inconsistently Applied in the Federal Courts	10
B. The *Faretta* Standard Is Inconsistently Applied in the State Courts	15
C. There Is a Conflict Within the Jurisdiction of the Second Circuit	17
D. The New York Court of Appeals Ignored This Court's Standard and Federal Case Law When It Improperly Ruled That Defendant Did Not Intelligently Choose to Represent Himself	18
Conclusion	23

TABLE OF AUTHORITIES

PAGE

Cases:

Burton v. State, 543 S.W.2d 761 (Ark. 1976) 16

Chapman v. United States, 553 F.2d 886 (5th Cir. 1977) 12
Clarke v. Zant, 247 Ga. 194, 275 S.E.2d 49 (1981) 15
Cooley v. United States, 501 F.2d 1249 (9th Cir. 1974) 20
Cordoba v. Harris, 473 F. Supp. 632 (S.D.N.Y. 1979) 19

Faretta v. California, 422 U.S. 816 (1975) 10, 11, 12, 13, 14, 16, 18, 21
Fillippini v. Ristaino, 585 F.2d 1163 (1st Cir. 1978) 21

Gideon v. Wainwright, 372 U.S. 335 (1963) 17, 19
Gottshalk v. State, 602 P.2d 448 (Alaska 1979) 15

Hollis v. State, 601 P.2d 62 (Nev. 1979) 16
Hooks v. State, 416 A.2d 189 (Del. Sup. Ct. 1980) 19

Kates v. Nelson, 435 F.2d 1085 (9th Cir. 1970) 22

Martin v. Wyrick, 433 F. Supp. 921 (W.D. Mo. 1977), *rev'd on other grounds,* 568 F.2d 583 (8th Cir. 1978), *cert. denied,* 435 U.S. 975 (1978) 11
Matthews v. State, 394 So.2d 304 (Miss. 1981) 15
Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976) 16, 19
McKee v. Harris, 485 F. Supp. 866 (S.D.N.Y. 1980), *aff'd,* 649 F.2d 927 (2d Cir. 1981), *cert. denied,* 102 S.Ct. 1773 (1982) 10, 11, 17, 20
Mixon v. United States, 608 F.2d 588 (5th Cir. 1979), *rehearing granted,* 616 F.2d 253 (1980), *vacated on other grounds,* 620 F.2d 486 (1980) 10, 18

People v. Sawyer, 57 N.Y.2d 12, 453 N.Y.S.2d 418 (1982) 21, 22

PAGE

People v. Teron, 151 Cal. Rptr. 633, 588 P.2d 773 (1979) 16
People v. Williams, 96 Ill. App. 3d 519, 421 N.E.2d 551 (1981) 15
Pickens v. State, 96 Wis.2d 549, 292 N.W.2d 601 (1980) 16

Russell v. State, 383 N.E.2d 309 (Ind. 1978) 15

State v. Blunt, 197 Neb. 82, 246 N.W.2d 727 (1976) 15
State v. Carpenter, 390 So.2d 1296 (La. 1980) 15
State v. Cunningham, 222 Kan. 704, 567 P.2d 879 (1977) 16
State v. Edwards, 592 S.W.2d 208 (Mo. Ct. of App. E.D. 1979) 16
State v. Gustafson, 278 N.W.2d 358 (N.D. 1979) 15, 16
State v. Harvey, 603 P.2d 661 (Mont. 1979) 16
State v. Jones, 266 N.W.2d 706 (Minn. 1978) 15
State v. McCabe, 101 Idaho 727, 620 P.2d 300 (1980) 16
State v. Trapp, 50 Ohio App. 189, 368 N.E.2d 1278 (1977) 15

United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978) 21
United States v. Coupez, 603 F.2d 1347 (9th Cir. 1979) 14
United States v. Davis, 604 F.2d 474 (7th Cir. 1979) 21
United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973) 13, 14, 19
United States v. Gillings, 568 F.2d 1307 (9th Cir. 1978), *cert. denied*, 436 U.S. 919 (1978) 12, 13, 14
United States v. Jones, 580 F.2d 788 (5th Cir. 1978) 19
United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982) 13, 14, 19, 20
United States v. King, 582 F.2d 888 (4th Cir. 1978) 12
United States v. McCaskill, 585 F.2d 180 (6th Cir. 1978) 11, 14
United States v. Pilla, 550 F.2d 1085 (8th Cir. 1977) 20, 21
United States v. Romero, 640 F.2d 1014 (9th Cir. 1981) 10, 11, 14, 18

PAGE

United States v. Rosenthal, 470 F.2d 837 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973) 13
United States v. Tompkins, 623 F.2d 824 (2d Cir. 1980) 10, 13
United States v. Warledo, 557 F.2d 721 (10th Cir. 1977) 14, 18
United States ex rel. Davis v. McMann, 386 F.2d 611 (9th Cir. 1967), *cert. denied*, 390 U.S. 958 (1968) 22
United States ex rel. Konigsberg v. Vincent, 526 F.2d 131 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976) 13, 14, 18, 19, 21
United States ex rel. Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975) 18
United States ex rel. Noll v. Fay, 219 F. Supp. 262 (S.D.N.Y. 1963) 18
United States ex rel. Smith v. Pavich, 568 F.2d 33 (7th Cir. 1978) 18, 22

Wallace v. State, 366 N.E.2d 1176 (Ind. 1977) 16, 17
Wilks v. Israel, 478 F. Supp. 404 (E.D. Wis. 1979), *aff'd*, 627 F.2d 32 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981) 21
Williams v. Florida, 399 U.S. 78 (1969) 22

Constitutional Provisions:

United States Constitution, Sixth Amendment 2

No.

IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT EARL SAWYER,

Respondent.

On Writ of Certiorari to the State of New York Court of Appeals

BRIEF FOR THE PETITIONER

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays for a writ of certiorari to review the judgment and decree of the New York Court of Appeals in the case of People of the State of New York vs. Robert Earl Sawyer. The judgment was entered on July 2, 1982.

Opinions and Orders Below

The opinion of the New York Court of Appeals is reported at 57 N.Y.2d 12, 453 N.Y.S.2d 418 (1982) and appears in the Appendix at 2a. The opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department, is reported at 83 A.D.2d 205 and the order appears in the Appendix at 20a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1257(3). The judgment of the New York Court of Appeals was entered on July 2, 1982, affirming the reversal of respondent's conviction by the New York Supreme Court, Appellate Division, Fourth Judicial Department.

Constitutional Provisions Involved

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Statement of the Case

The defendant and respondent herein, Robert Earl Sawyer, was indicted by the Chautauqua County Grand Jury and charged with two counts of murder in the second degree (New York Penal Law § 125.25) for shooting Miss Jeanne Humm twice in the head during a robbery of a general store.

On March 2, 1978, defendant, who had contested his extradition from the State of Maine, was returned to New York State, arraigned and informed of the charges against him. He was also advised that he would be entitled to an attorney at all stages of the proceedings. Defendant, thirty-one years old, had previously been convicted of a felony and had served a prison sentence. At the extradition and the trial that resulted in his prior conviction, defendant had been represented by counsel.

On March 9, 1978, Charles Edward Fagan, Esq., the former Public Defender of Chautauqua County, appeared on defendant's behalf and argued that a conflict of interest existed as a result of a recent exchange of personnel between the offices of the Public Defender and the District Attorney. The trial court noted that the new Public Defender, who had been the Chief Assistant District Attorney, was separated from the case by a prior disassociation order. Defendant was given one week to retain counsel.

On March 16, 1978, Mr. Fagan informed the court that defendant was indigent, and the court appointed an assistant public defender. Defendant responded, "I don't want the Public Defender, Your Honor."

On March 20, defendant reiterated that he refused the counsel assigned. The court informed defendant that he had only two choices: either accept the assignment or proceed *pro se*. Defendant responded that he was not capable of defending himself but nevertheless refused to be represented by assigned counsel. The assistant public defender indicated that defendant refused to cooperate with him.

On March 22, 1978, defendant refused to enter a plea and again rejected the assignment of any assistant public defender. The court repeated the two choices open to defendant, and he persisted in rejecting representation by assigned counsel. The court relieved the Public Defender, declared that defendant was his own lawyer and entered a plea of not guilty for him. The following colloquy then took place:

> The Court: And do you want a lawyer?
>
> Defendant: Yes, Your Honor.
>
> The Court: Then, you have the Public Defender, and I am asking you how you plead to this charge?
>
> Defendant: I cannot plead now, Your Honor, because I cannot accept the Public Defender's Office as counsel.
>
> The Court: I hold him in contempt of Court. The Public Defender—either you are your own lawyer, or the Public Defender is your lawyer. Now, which? Which?
>
> Defendant: I don't want the Public Defender, Your Honor.
>
> The Court: Then, you are your own lawyer. I enter a plea of not guilty, on your behalf, and I give you 30 days in which to make motions on your behalf.
>
> Mr. Carpenter [Assistant Public Defender]: I take it, an order is entered relieving the Public Defender of

representing Mr. Sawyer at this time? Thank you, Your Honor.

. . . .

The Court: I don't know where you are getting your legal advice, but it's wrong. . . . I don't know how you are going to make your own motions. It's up to you. You have chosen to be your own lawyer, since you will not accept the lawyer I have assigned—

Defendant: I have not chosen—

The Court: You have chosen. I am giving you another chance. You may make your own choice. One, represent yourself. Two, be represented by the Public Defender. You have no other choice. You are facing a very serious charge. If guilty and convicted, a mandatory sentence is life imprisonment. I strongly suggest you stop playing games with this Court and look out for your own best interests. Your own best interests are probably served by having a lawyer represent you. You will not have me assign anybody, or accept the Public Defender. Now, I know you've been talking with another lawyer. I do not know whether or not he has given you any advice, but if he has given you any advice that is contrary to what the Courts of this State say, obviously, it isn't good advice. Now, if you want the Public Defender, I will re-appoint him; otherwise, you have no lawyer.

The Defendant: I want to put on the record, I am not competent to defend myself, Your Honor.

The Court: In that case, I assign the Public Defender again to represent you, and I will not hear you say anything one way or the other. You have a lawyer, or you don't have. Do you think I'm going to saddle the people of this County with a huge legal bill when they have already provided a whole Public Defender's department, with investigatory staff, with good lawyers? Do you really think that you have a right which no other person—no other person has gained? Do you really think so?

Defendant: I might have to take it to a higher Court.

The Court: You will take it to a higher Court, then because right now you have your choice. A plea of not guilty is entered on your behalf. You have 30 days in which to make motions.

On March 27, 1978, in response to an oral bail application, there ensued the following:

The Defendant: I am requesting bail be set, Your Honor.

The Court: I know that you have one previous conviction in this Court. I believe it was possession of marijuana and possession of a weapon. They were consolidated back in 19—

The Defendant: I was not convicted of possession of a weapon.

The Court: The plea to the possession of marijuana covered both indictments that had been returned.

The Defendant: No.

The Court: You did not plead to the weapons.

The Defendant: I was not convicted of possession of weapons.

The Court: Right, right. According to the sentencing minutes, the plea to the one indictment satisfied all. Now, I will tell you what my decision on bail is. A murder charge is very very serious and would require large bail. So, I . . . set no bail in any murder charge. . . . At this time, the Public Defender has pointed out to me that I have not issued a formal order relieving him from the assignment which I made. Is it your desire that you now do so?

The Defendant: Your Honor, it is completely up to you.

The Court: No, I am asking you. Would you please answer me yes, or no.

The Defendant: We have already discussed this at the last hearing.

The Court: Do you want me to relieve the Public Defender?

The Defendant: I do not consent to have him assigned as my counsel.

The Court: And by not consenting, you say as much you would not accept him as your counsel?

The Defendant: That's correct.

The Court: And would not cooperate with him; would not talk to him and accept the services of his department, is that correct?

(Whereupon there was no response from the Defendant.)

The Court: You just don't accept him, period?

The Defendant: I do not consent to have him as my assigned counsel, Your Honor.

The Court: Well, I relieve the Public Defender of the assignment which I have made. Please note for the record that Mr. Sawyer is his own counsel as such. I have instructed the District Attorney to get together everything for discovery as quickly as possible.

On June 10, 1978, the following colloquy took place.

Defendant Sawyer: I would like to say something, Your Honor.

The Court: Certainly.

Defendant Sawyer: I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs. Wainwright: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by Counsel (*sic*). Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for

himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

The Court: I have offered you counsel, Mr. Sawyer.

On at least three more occasions before the trial began, the Court offered to make the Public Defender's office available, but defendant stood firm. On March 31, 1978, defendant, *pro se,* brought an Article 78 proceeding to seek assignment of counsel not associated with that office. An amendment was filed on May 21, 1978, seeking an injunction against the proceeding until the original petition was decided. The Appellate Division, Fourth Judicial Department, denied the application.

After a discovery proceeding on July 19, 1978, in which defendant received all discoverable materials, a suppression hearing was held on July 25, 1978. At the close of the hearing, defendant complained that he was experiencing difficulty getting access to a telephone and stated, "Your Honor, I am trying to conduct a defense in my own behalf. . . ."

On October 20, 1978, defendant was found guilty after a trial in which he was shown to be near the scene of the crime. Defendant's Smith and Wesson .41 Magnum re-

volver, recovered from his barn, was determined to be the gun used in the crime. Defendant was sentenced to an indeterminate term of imprisonment of twenty-five years to life.

Upon defendant's appeal of his conviction, the Appellate Division, Fourth Department, by a split court reversed his conviction and granted a new trial on the ground that defendant had been improperly denied a continuing choice of either relying on the assigned attorney or proceeding *pro se*.

Leave to appeal this order was granted by Hon. Dominick L. Gabrielli, Associate Judge, New York State Court of Appeals on December 28, 1981. The order was upheld by a vote of four to three. The Court ruled that the record failed to demonstrate that defendant-respondent knowingly and intelligently decided to proceed *pro se*. The New York Court of Appeals in September 1982 denied a motion to reargue. That order was not drawn up by the Court in time for inclusion in this petition.

Reasons for Granting the Writ

POINT ONE

The New York Court of Appeals improperly decided that defendant-respondent did not intelligently exercise his right to proceed *pro se* because the constitutional standard remains insufficiently defined.

The sanctioning by the New York Court of Appeals of the whipsaw strategy of defendant-respondent, as well as several similar gross misapplications of this Court's rule governing the knowing and intelligent decision to proceed

pro se, suggest that the issue be addressed. It is a direct result of the sole, vague standard set down by this Court in *Faretta* v. *California*, 422 U.S. 816 (1975), and the rule must be further explicated.

A. The *Faretta* Standard Is Inconsistently Applied in the Federal Courts.

This Court's rule on the valid waiver of the right to counsel and the concomitant right to proceed *pro se* was set forth in *Faretta* v. *California*:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

422 U.S. at 835.

The ambiguousness of this standard has resulted in inconsistent and questionable rulings. While some courts require a searching inquiry, others have found a valid decision on self-representation with little or no discussion. *Compare, United States* v. *Tompkins*, 623 F.2d 824 (2d Cir. 1980), and *United States* v. *Romero*, 640 F.2d 1014 (9th Cir. 1981); *Mixon* v. *United States*, 608 F.2d 588 (5th Cir. 1979), *rehearing granted*, 616 F.2d 253 (1980), *vacated on other grounds*, 620 F.2d 486 (1980). Thus, where the trial court failed to inform a defendant of the charges, possible punishment and available defenses, federal courts have split on the validity of a decision to represent oneself. *McKee* v. *Harris*, 485 F. Supp. 866 (S.D.N.Y. 1980), *aff'd*, 649 F.2d

927 (2d Cir. 1981), *cert. denied,* 102 S.Ct. 1773 (1982) (held: decision knowing and intelligent; court did inform defendant of option to be represented by attorney and of its advantages); *Mixon* v. *United States,* 608 F.2d 588, 590 (5th Cir. 1979) (held: decision knowing, despite lack of inquiry); *United States* v. *Romero,* 640 F.2d 1014 (9th Cir. 1981) (held: decision knowing, despite fact that extent of inquiry was advice that self-representation would be unwise); *Martin* v. *Wyrick,* 433 F. Supp. 921 (W.D. Mo. 1977), *rev'd on other grounds,* 568 F.2d 583 (8th Cir. 1978), *cert. denied,* 435 U.S. 975 (1978) (held: decision not knowing, notwithstanding repeated assertions of the right to proceed *pro se*). This sample of cases demonstrates the conflict between the Circuit Courts.

There are several reasons for such disparate decisions. Each factor by itself provides an independent basis for this Court to grant certiorari and resolve an increasingly difficult problem for State and Federal trial courts; in the aggregate those reasons overwhelmingly dictate that this Court accept jurisdiction and provide needed guidance, for conflicting decisions are certain to continue.

First, beyond the finding that a defendant's decision is knowing and intelligent, the sole guidance provided in *Faretta* v. *California, supra,* is that it be made with "eyes open." 422 U.S. at 835. "There was . . . no occasion in *Faretta* to lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct in order to determine whether a defendant has 'knowingly and intelligently' chosen to forego the benefits of counsel." *United States* v. *McCaskill,* 585 F.2d 189, 190 (6th Cir. 1978). Without such criteria, similar facts will lead to in-

consonant results. The "eyes open" standard is so elusive as to constitute no standard at all. This Court can cure the floundering by the lower courts by fully explicating circumstances that constitute an "eyes open" decision.

The second reason why the *Faretta* standard has produced conflicting decisions was recognized in the dissenting opinion:

> [T]he opinion leaves open a host of other procedural questions .... Many of them ... such as the standards of waiver and the treatment of the *pro se* defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation.

422 U.S. at 852 (Blackmun, J.).

The Fifth Circuit's comment notes the problem of application.

> In delineating those requirements, courts must consider the fundamental nature of the right and the legitimate concern for the integrity of the trial process. Particular requirements can be justified only insofar as they are functionally related to reconciling those interests.

Chapman v. *United States*, 553 F.2d 886, 895 (5th Cir. 1977).

Thus, while a defendant's right to represent himself has been recognized, it remains uncertain in practice. The absence of clear procedures and the failure of *Faretta* to encompass recurring strategies of defendants contribute to the elusive quality of the requirements for validly choosing self-representation. To be sure, no particular form of interrogation or colloquy should be mandated. *United States* v. *King*, 582 F.2d 888, 890 (4th Cir. 1978); *United States* v.

Gillings, 568 F.2d 1307, 1308 (9th Cir. 1978), *cert. denied,* 436 U.S. 919 (1978); *accord, United States* v. *Kimmel,* 672 F.2d 720, 722 (9th Cir. 1982). *Contra, United States* v. *Tompkins,* 623 F.2d 824, 828 (2d Cir. 1980). Despite this recognition, *Gillings, supra,* and *Kimmel, supra,* resulted in reversal or remand of some kind, further illustrating the confusion that reigns. The *Tompkins* court noted, in a typically schizophrenic fashion for this area of appellate review, that "the requirement of such a 'full and calm discussion' is not absolute. . ." Basic "rules of the game" need to be explicated where in hundreds of instances

> whether it be by the design or because of misguidance or naivete on the part of the accused, the trial court lays an appeal or a collateral attack by either a denial or the granting of the request.

United States v. *Dujanovic,* 486 F.2d 182, 185 (9th Cir. 1973).

In *Dujanovic,* despite recognition of the trial court's dilemma—which persists after *Faretta* as evidenced by the abundance of appeals and reversals based on this ground*—application of the pre-*Faretta* "open eyes" criterion resulted in a retrial. Contrariwise, other courts have held that the failure to inform defendant of the risks of proceeding *pro se* may not, in certain circumstances, require reversal. That is, "open eyes" may be demonstrated by other methods. *United States ex rel. Konigsberg* v. *Vincent,* 526 F.2d 131, 134 (2d Cir. 1975), *cert. denied,* 426 U.S. 937, 96 S.Ct. 2652 (1976); *United States* v. *Rosenthal,* 470 F.2d 837, 844-45 (2d Cir. 1972), *cert. denied,* 412 U.S. 909

* This, despite the *Faretta* majority's assumption that once a defendant elected to represent himself, he would be bound by his choice. 422 U.S. at 835 n.46. See dissenting opinion of Chief Justice Burger, 422 U.S. at 846.

(1973). This crazy quilt of cases and emphases in procedure begs clarification and direction from this Court.

A third reason for the conflicts in the federal courts is grounded in the nature of the right to proceed *pro se*. Some courts speak of the right to proceed *pro se* as a waiver of the right to assistance of counsel and so equate it with all other constitutional rights. *E.g., United States* v. *Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982); *United States* v. *Romero*, 640 F.2d 1014 (9th Cir. 1981); *United States* v. *McCaskill*, 585 F.2d 189, 190 (6th Cir. 1978); *United States* v. *Gillings*, 568 F.2d 1307 (9th Cir. 1978); *United States* v. *Warledo*, 557 F.2d 721, 726 (10th Cir. 1977); *United States* v. *Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973). Others have distinguished it from a waiver of a constitutional right; instead, it is a decision to assert one constitutional right instead of another. *See United States* v. *Coupez*, 603 F.2d 1347, 1351 (9th Cir. 1979); *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131, 134 (2d Cir. 1975). This Court in *Faretta* implicitly recognized that the operational factor involved is an election of rights. Since an attorney may not be thrust upon a defendant, the Court refers to the defendant's "choice" to exercise his right to represent himself. 422 U.S. at 835. The Court recognized this as an independent right, equivalent to representation by counsel. 422 U.S. at 832-33. These diverse views exemplify the confusion that abounds on the appellate level. It must, perforce, exceed that on the trial level where decisions have to be made on a spontaneous basis. Moreover, the results have necessarily been divergent. The distinction between the waiver of a constitutional right—perhaps the most important right to a defendant in a criminal proceeding, the right to counsel—and an election between competing constitu-

tional rights is by no means academic. A waiver would imply a full-blown inquiry into the rights being relinquished and the ramifications of the waiver, including the recognition that a particular penalty may loom and that the task generally requires the ability and background of an attorney. Perceived as an election, a brief review of the risks and possible consequences should ensure an informed decision. The totality of circumstances, so often an aid to courts in their decision concerning a particular event, may reveal facts pertinent to one view and not the other. For example, colloquy may disclose an awareness of the rights being renounced but not of the risks involved, as in the case at bar according to the view of the New York State Court of Appeals.

This Court, we suggest, should address those problems in order to make the law clear, the outcome predictable, and convictions final.

B. The *Faretta* Standard Is Inconsistently Applied in the State Courts.

State courts have also divided with respect to how to conceive of the right to proceed *pro se*. Several have deemed it a waiver of the right to counsel. *Gottshalk* v. *State*, 602 P.2d 448 (Alaska 1979); *Clarke* v. *Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981); *People* v. *Williams*, 96 Ill. App. 3d 519, 421 N.E.2d 551 (1981); *Russell* v. *State*, 383 N.E.2d 309 (Ind. 1978); *State* v. *Carpenter*, 390 So.2d 1296 (La. 1980); *State* v. *Jones*, 266 N.W.2d 706 (Minn. 1978); *Matthews* v. *State*, 394 So.2d 304 (Miss. 1981); *State* v. *Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976); *State* v. *Gustafson*, 278 N.W.2d 358 (N.D. 1979); *State* v. *Trapp*, 50 Ohio App. 189, 368 N.E.2d 1278 (1977). Others have deemed it

an election of a right. *People* v. *Teron*, 151 Cal. Rptr. 633, 588 P.2d 773 (1979); *State* v. *McCabe*, 101 Idaho 727, 620 P.2d 300 (1980); *State* v. *Cunningham*, 222 Kan. 704, 567 P.2d 879 (1977); *State* v. *Edwards*, 592 S.W.2d 208 (Mo. Ct. of App., E.D. 1979); *State* v. *Harvey*, 603 P.2d 661 (Mont. 1979); *Hollis* v. *State*, 601 P.2d 62 (Nev. 1979). These varying perceptions, of course, signify demonstrable differences in the type of warnings required to be given to an accused. To the same effect is *Pickens* v. *State*, 96 Wis.2d 549, 292 N.W.2d 601, 608 (1980), wherein the Supreme Court of Wisconsin reviewed *Faretta* v. *California*, *supra*, and *Maynard* v. *Meachum*, 545 F.2d 273 (1st Cir. 1976), and concluded that "there is no particular piece of information that is essential to an effective waiver of counsel."

For example, in *State* v. *Gustafson*, 278 N.W.2d 358 (1979), North Dakota, a jurisdiction that defines the right as activated by a waiver, held that if a defendant comprehends the right to counsel and makes no request for counsel, he has waived counsel. In *State* v. *Harvey*, 603 P.2d 661 (1979), Montana, a state that has defined the right as a choice or election, held that advising of the risks of self-representation will suffice. In *Burton* v. *State*, 543 S.W.2d 761 (Ark. 1976), refusal to accept appointed counsel because he suggested defendant plead guilty constituted a valid election. These disparate results similarly call for review and clarification by this Court.

The inconsistent results and contrary perceptions in the state courts derive directly from the vague language in *Faretta*. As the dissenters, including Chief Judge Givan, noted in *Wallace* v. *State*, 366 N.E.2d 1176 (Indiana 1977),

the trial judge faces a dilemma that will give rise to an appeal no matter what decision is made. *Id.* at 1177.

> It is difficult to justify reversing a conviction on such a vague directive as, "defendant must have his eyes open," without giving the trial court any further guidance. . . . Reversing on such a colloquial formulation, however, without making any further attempt to define it, also implies that this case would be reversed again after remand and retrial. Not only is the 'eyes open' standard vague, but it is also essentially purposeless.

Id at 1179.

The state courts demand clarification of *Faretta.* The dissenters in *Wallace* contend, for example, that the "eyes open" language is advisory only. The confusion that abounds is warranted; this Court should eliminate chaos by granting the writ in the case at bar.

C. There is a Conflict Within the Jurisdiction of the Second Circuit.

The case at bar presents a case in which the trial court exhorted defendant that he was ill-advised to represent himself and informed him of his right to counsel, the seriousness of the charges and the possible punishment. Defendant himself cited the dangers of self-representation to the court by reading from *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). In two cases within the Circuit respective courts failed to inform defendant of the charges and the possible punishment. Nonetheless, where defendant in fact was aware of the risks and was literate and competent, the District Court found, and the Second Circuit upheld, that an informed decision had been made. *McKee* v. *Harris,* 485 F. Supp. 866 (S.D.N.Y. 1980), *aff'd,* 649 F.2d 927 (2d Cir.

1981), *cert. denied,* 102 S.Ct. 1773 (1982); *United States ex rel. Konigsberg* v. *Vincent,* 526 F.2d 131 (2d Cir. 1975). This dichotomous situation within a federal circuit demands resolution by the highest Court.

D. The New York Court of Appeals Ignored This Court's Standard and Federal Case Law When It Improperly Ruled That Defendant Did Not Intelligently Choose to Represent Himself.

Although the New York Court of Appeals cited *Faretta* v. *California, supra,* in the instant case, it failed to consider its rule or the progeny of federal case law on intelligence of *pro se* elections. In so doing that court demonstrates the epidemic inability to apply the *Faretta* rule meaningfully and predictably.

The federal courts have, in the absence of guidelines, looked to various factors in evaluating the intelligence of a decision to represent oneself. Thus the courts have examined, *inter alia,* the defendant's familiarity with courtroom procedure and criminal background [*Mixon* v. *United States,* 608 F.2d 588, 590 (5th Cir. 1979); *United States ex rel. Smith* v. *Pavich,* 568 F.2d 33 (7th Cir. 1978); *United States ex rel. Konigsberg* v. *Vincent,* 526 F.2d 131, 134 (2d Cir. 1975), *cert. denied,* 426 U.S. 937 (1976)]; the possible effect lengthy incarceration may have on defendant's state of mind [*United States ex rel. Noll* v. *Fay,* 219 F. Supp. 262, 268 (S.D.N.Y. 1963)]; defendant's educational background [*United States* v. *Warledo,* 557 F.2d 721 (10th Cir. 1977); *United States ex rel. Martinez* v. *Thomas,* 526 F.2d 750, 755 (2d Cir. 1975)]; "sophisticated legal hijinks" [*United States* v. *Romero,* 640 F.2d 1014 (9th Cir. 1981); *Cordoba*

v. *Harris*, 473 F. Supp. 632 (S.D.N.Y. 1979); *United States ex rel. Konigsberg* v. *Vincent, supra*]; a defendant's conduct, including obstreperousness [*United States* v. *Dujanovic*, 486 F.2d 182 (9th Cir. 1973)]; and defendant's literacy and ability to articulate his thoughts [*United States* v. *Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982); *United States* v. *Jones*, 580 F.2d 785, 788 (5th Cir. 1978)].

The case at bar satisfies almost every factor that militates in favor of a finding of an informed decision to conduct a *pro se* defense. Defendant, thirty-one years old, had been previously convicted of a felony and had been represented by counsel at that proceeding and in the lengthy litigation regarding his extradition from Maine to New York leading to the instant prosecution. His familiarity with courtroom procedures and the advantages of counsel were manifest. Defendant was articulate and often opined his inferior ability to conduct his defense while simultaneously eschewing assistance from the office of the Public Defender. These events demonstrate his appreciation of the risks involved in proceeding *pro se*. The choice presented was not constitutionally offensive. *Maynard* v. *Meachum*, 545 F.2d 273, 278 (1st Cir. 1976); *Hooks* v. *State*, 416 A.2d 189 (Del. Sup. Ct. 1980). Moreover, defendant had been told at his arraignment that he was entitled to an attorney at all stages of the proceedings. The trial court also advised defendant, as required in most of the federal courts, that the charges were serious, that a life sentence was possible, and that it would be in his best interest to have an attorney represent him. Defendant's recitation of the risks of self-representation as set forth in *Gideon* v. *Wainwright, supra*, was most telling. He nonetheless per-

sisted in declining counsel, again offered him by the trial court. His strategic maneuvering was successful despite the fact that from his own lips he had provided "a far clearer indication of his personal appreciation of the particular risks involved than if the court had uttered the warnings and the defendant merely acknowledged his understanding by a simple 'yes'." (Dissenting Op.) (Jasen, J). Since "the test concerns what the accused understood rather than what the court said or understood, explanations are not required." *United States* v. *Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982), *quoting*, *Cooley* v. *United States*, 501 F.2d 1249, 1252 (9th Cir. 1974). The totality of circumstances governs, and it indicates that defendant, who insisted upon the course he followed and knew his rights, should have been bound to his election.

The instant case presents facts that are essentially congruent to several federal cases that found the *pro se* choice an informed one. Failure to inquire into reasons for defendant's dissatisfaction with counsel was held harmless where the reasons were clear and where defendant's absolute insistence on discharging counsel did not vitiate the validity of defendant's *pro se* election. *McKee* v. *Harris*, 485 F. Supp. 866 (S.D.N.Y. 1980), *aff'd*, 649 F.2d 927 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1773 (1982).

In a case that is on all fours, *United States* v. *Pilla*, 550 F.2d 1085 (8th Cir. 1977), defendant, like Sawyer, knew he had a right to counsel and that he would have to go to trial without counsel if he refused appointed counsel's services. Defendant, like Sawyer, repeatedly stated he did not know how to defend himself. Like Sawyer, he refused to cross-

examine witnesses and put in no defense. Unlike Sawyer, Pilla was held to have "intelligently, voluntarily and effectively waived his constitutional right of representation." 550 F.2d at 1093. *See Wilks* v. *Israel*, 478 F. Supp. 404 (E.D. Wis. 1979), *aff'd*, 627 F.2d 32 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981); *United States* v. *Davis*, 604 F.2d 474 (7th Cir. 1979); *Fillippini* v. *Ristaino*, 585 F.2d 1163 (1st Cir. 1978).

The diametrically opposed results between *Pilla*, *Konigsberg*, *supra*, *Davis*, *supra*, *Fillippini*, *supra*, and *Sawyer* did not derive from a New York Court of Appeals decision to expand defendant's constitutional rights. Instead, the fallacy of the decision in *Sawyer* is rooted in a fundamental misapplication of *Faretta* because of its absence of evidence and, consequently, consistent standards. This ruling ignores the realities of a defendant who has determined his modus operandi and will not be swayed from his course. It ignores the reality confronting the trial court of confusion over the essential quality of the right, i.e., whether it requires a waiver or constitutes an election. The ruling ignores the reality that a defendant may not dictate choice of appointed counsel. *See United States* v. *Davis*, 604 F.2d 474, 479 (7th Cir. 1979); *United States* v. *Burton*, 584 F.2d 485, 489, 490 (D.C. Cir. 1978). Defendant's effort to do so should not be countenanced by means of a hypertechnical application of a vague standard. The decision also elevates the glorification of form over substance to a constitutional level. Thus, unless an unspecified inquiry is made, since due regard is not accorded to the totality of circumstances, a trial and conviction may be invalidated. The absurdity of this result is glaring since the New York Court of Ap-

peals calls for "appropriate colloquy" but never specifies what questions will constitute a "searching inquiry." A trial court may read the *Sawyer* decision today and not be enlightened as to how to avoid reversible error in a similar situation. Finally, the decision below sanctions the type of gamesmanship that can only undermine public confidence in the criminal justice system. See *United States ex rel. Smith* v. *Pavich*, 568 F.2d 33 (7th Cir. 1978), *quoting, Williams* v. *Florida*, 399 U.S. 78, 82 (1969); *Kates* v. *Nelson*, 435 F.2d 1085, 1088-89, *quoting, United States ex rel. Davis* v. *McMann*, 386 F.2d 611, 618-19 (9th Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); *People* v. *Sawyer*, 57 N.Y.2d 12, 453 N.Y.S.2d 418, 425 (1982) (dissenting opinion). Such a contortion of logic and justice should not invoke the United States Constitution or the decisions of this Court to accomplish its purpose.

Conclusion

For the foregoing reasons, we respectfully ask that a writ of certiorari issue to review the judgment and decision of the New York Court of Appeals.

Respectfully submitted,

JOHN WARD
District Attorney
Chautauqua County, New York
County Office Building
Mayville, New York 14757
Attorney for Petitioner

MICHAEL A. GROSS
STEVEN J. GREENBLATT
Of Counsel
NYS Division of Criminal
Justice Services
Bureau of Prosecution and
Defense Services
80 Centre Street
New York, New York 10013